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IN THE

Supreme Court of the United States

SHIRLEY EDWARDS,

Petitioner,

v.

A.H. CORNELL AND SON, INC., D/B/A AH CORNELLS; MELISSA CLOSTERMAN; SCOTT A. CORNELL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the anti-retaliation provision of the Employee Retirement Income Security Act, 29 U.S.C. § 1140, permit an employer to discharge an employee for making unsolicited internal complaints regarding violations of the statute?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Shirley Edwards respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 610 F.3d 217. The district court's opinion (Pet. App. 31a-41a) is unpublished.

JURISDICTION

The court of appeals entered judgment on June 24, 2010. Pet. App. 1a. The court denied a timely petition for rehearing and rehearing en banc on July 26, 2010. Pet. App. 42a-43a. Justice Alito extended the time for filing the petition until November 30, 2010. No. 10A370. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 510 of the Employee Retirement Income Security Act, 29 U.S.C. § 1140, provides in relevant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act.

STATEMENT OF THE CASE

Petitioner Shirley Edwards was terminated by her employer for complaining that certain company practices violated the Employee Retirement Income Security Act (ERISA). The Third Circuit upheld the dismissal of her claim under ERISA's anti-retaliation provision, holding – in acknowledged conflict with the decisions of other circuits – that the statute does not protect unsolicited internal complaints.

1. **Statutory Framework.** ERISA is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). The statute "imposes participation, funding, and vesting requirements" on pension plans, and sets uniform standards for "reporting, disclosure, and fiduciary responsibility" for pension and other employee benefit plans. *Id.* at 91.

In passing ERISA, Congress included a detailed enforcement scheme "to preclude abuse and 'to completely secure the rights and expectations'" established by the statute. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (citation omitted). Among other things, the statute authorizes the Department of Labor to conduct investigations into possible ERISA violations and bring enforcement actions. 29 U.S.C. §§ 1132, 1134. It also allows civil actions by plan participants, beneficiaries, and fiduciaries to remedy and deter violations. 29 U.S.C. § 1132(a)(1)-(4), (a)(9).

Congress regarded ERISA's anti-retaliation provision, Section 510 of the Act, as a "crucial part" of the statute's enforcement regime. *Ingersoll-Rand*

Co., 498 U.S. at 143. The provision makes it "unlawful for any person to discharge, fine, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to" ERISA. 29 U.S.C. § 1140.

2. **Factual Background.** In March 2006, respondent A.H. Cornell and Son, Inc. hired petitioner Shirley Edwards to serve as its Director of Human Resources. Pet. App. 3a. A few years later, Edwards came to believe that the company was violating ERISA by, among other things, administering its group health plan on a discriminatory basis, not offering health benefits to some employees and misrepresenting the cost of health insurance to others to dissuade them from opting into the plan. *Id.*

Petitioner complained of the ERISA violations to the company's owners and managers. In response, respondents terminated her. Pet. App. 3a.

3. **Procedural History.** Edwards brought suit in the Eastern District of Pennsylvania, alleging that respondents violated Section 510 of ERISA by terminating her in retaliation for her "inquir[ies,] objections, opposition, and/or complaints about ERISA violations" at the company. First Amended Complaint ¶ 39. Respondents moved to dismiss, asserting that Section 510 does not apply when an employee complains to a company's owners or management rather than to an external entity. Pet. App. 33a.

a. Relying on the Second Circuit's analysis in *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005) (per curiam), the district court held that

Section 510 does not protect employees who raise allegations of ERISA violations within their company unless the employer solicits the information. Pet. App 40a-41a. Because Edwards had brought her complaints to respondents on her own initiative, the district court dismissed the complaint for failure to state a claim. Pet. App. 41a.

b. Edwards appealed to the Third Circuit. At the outset, the panel recognized that the courts of appeals are divided on the question "whether the anti-retaliation provision of Section 510 of ERISA, 29 U.S.C. § 1140, protects an employee's unsolicited internal complaints to management." Pet. App. 2a. "Four federal Courts of Appeals have ruled on this issue," the court observed. *Id.* "[T]he Fifth and Ninth Circuits have held in the affirmative, and the Second and Fourth Circuits have held in the negative." *Id.* In a divided decision, the panel "agree[d] with the latter, and [held] that unsolicited internal complaints are not protected." *Id.*

The majority began its analysis by recognizing that "Edwards has undoubtedly 'given information' by objecting and/or complaining to management." Pet. App. 12a. The critical question was "whether or not Edwards did so in any 'inquiry or proceeding'" relating to ERISA. *Id.* The majority held that she did not.

The court construed the term "inquiry" narrowly to include only a an externally-initiated "request for information." Pet. App. 12a. Thus, the court held, the information Edwards provided her supervisors was not part of an inquiry because she volunteered the information rather than providing it in response to a question. *Id.* The court also rejected Edwards'

assertion that her communications were themselves protected inquiries. "[A] plain reading of the provision indicates that 'inquiry' includes only inquiries made of an employee, not inquiries made by an employee." Pet. App. 13a.

The court further held that, in any event, ERISA protects only statements made in the course of a formal proceeding, like a lawsuit or agency investigation. The word "proceeding," the court observed, implies a "formal action" before a "tribunal or agency." Pet. App. 13a. And although the word "inquiry" might seem broader, the Third Circuit agreed with the Fourth that "the phrase 'testified or is about to testify' implies that the phrase 'inquiry or proceeding' is limited to more formal actions." *Id.*

The majority recognized that the Fifth and Ninth Circuits had reached the opposite conclusion. Pet. App. 7a. But in its view, the reasoning of those decisions was "not compelling." Pet. App. 14a. The Third Circuit also acknowledged that its holding conflicted with the interpretation of the Department of Labor, which construes Section 510 to protect unsolicited internal complaints. Pet. App. 12a. But the panel declined to defer to that interpretation because it found the meaning of the statutory language clear. Pet. App. 14a-15a.

For the same reason, the court refused to examine whether its holding was consistent with the statute's protective purposes. Pet. App. 14a. The majority did not dispute that under its interpretation, the statute "would permit an employer to terminate an employee upon the employee first notifying the employer of an ERISA violation." Pet. App. 14a-15a (citation omitted). But

if Congress had intended to prevent that result, the court asserted, it would have used different language. Pet. App. 15a.

c. Judge Cowen dissented. He rejected the majority's conclusion that the statutory language unambiguously precluded protection for employee-initiated internal complaints, particularly in light of the court's obligation to read the statute in light of its purposes and to avoid absurd results. Pet. App. 19a-20a. The word "inquiry," he explained, is a broad term and could be read to encompass employee complaints as the "crucial 'first step'" of many investigations. Pet. App. 22a-23a. It was "highly doubtful," he observed, "that Congress could have ever intended" to "leave[] totally unprotected" the very conduct "this remedial statutory provision was enacted to protect in the first place." Pet. App. 20a. To hold otherwise, he pointed out, required concluding that Congress "essentially permitted (and perhaps, in essence, encouraged) [an employer] to fire an employee immediately after she makes an informal complaint." Pet. App. 23a. He found this result particularly untenable as applied to certain employees who, "given their responsibility to conduct potentially sensitive and damaging investigations into possible ERISA violations and related matters, would need protection from retaliation even more than employees who merely answer[] some questions." Pet. App. 24a.

Judge Cowen further observed that the majority's rule is ultimately "unworkable." Pet. App. 23a. "[W]here does one draw the line," he asked, between an unprotected initial complaint and a protected statement "purportedly made as part of

some sort of inquiry?" *Id.* Suppose, for example, "an employee like Edwards complains to her superior, the superior asks some follow-up questions, and the employee responds to these questions." *Id.* Congress could not have intended, Judge Cowen argued, to protect those responses but not the initial complaint. *Id.*

d. Edwards filed a timely petition for rehearing en banc, which the Third Circuit denied. Pet. App. 42a-43a.

REASONS FOR GRANTING THE WRIT

As the Third Circuit acknowledged, the courts of appeals are deeply divided over whether and how ERISA's anti-retaliation provision applies in a frequently recurring circumstance: unsolicited complaints to company management. Two circuits (as well as the agency charged with ERISA's administration), construe Section 510 to cover all such complaints. Three others read the provision more narrowly, although even these circuits disagree with one another about when, if ever, statements to company management fall within the scope of the provision.

An anti-retaliation provision cannot perform its critical function in the midst of such uncertainty. Indeed, this Court has repeatedly granted certiorari to resolve similar circuit conflicts regarding the existence or scope of federal anti-retaliation protections. *See, e.g., Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 850 (2009); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 445 (2008); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 56-57 (2006); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 172-73

(2005); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). It should follow the same course in this case.

I. The Decision Below Adds To A Firmly Entrenched Conflict Among The Courts Of Appeals.

The circuits are intractably divided over whether Section 510 encompasses unsolicited internal complaints regarding potential ERISA violations. The question arises and has important consequences in two contexts: suits brought directly under Section 510 and suits in which defendants attempt to remove state wrongful discharge claims to federal court on the ground that ERISA completely pre-empts the state law claim by providing an alternative federal cause of action.[1] Five courts of appeals have

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[1] Although defendants may assert pre-emption defenses in state court, they may not remove the case to federal court unless ERISA "completely pre-empts" state law by "provid[ing] the exclusive cause of action for the claim asserted." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003); *see also King v. Marriott Int'l*, 337 F.3d 421, 425 (4th Cir. 2003); *Rogers v. Foods, Inc.*, 308 F.3d 785, 788 (7th Cir. 2002) (collecting authorities). Thus, to decide whether state wrongful discharge claims were completely pre-empted so as to support removal to federal court, the Fourth, Fifth, and Ninth Circuits have been required to determine whether allegations in a state complaint established a claim under Section 510. *See, e.g., King*, 337 F.3d at 425; *Anderson v. Elec. Data Sys., Corp.*, 11 F.3d. 1311, 1315 (5th Cir. 1994); *Hashimoto v. Bank of Hawaii*, 999 F.2d 408, 412 (9th Cir. 1993). Because determining the scope of Section 510 was necessary to these decisions, these cases control suits within these circuits brought directly under Section 510 as well. *See, e.g., McClendon v. Hewlett-Packard, Co.*, No. CV-05-087-S-BLW, 2005 WL 1421395, at *5 (D. Idaho June 9, 2005) ("The

considered this issue in one of these two contexts: two circuits, as well as the Department of Labor, construe Section 510 to protect unsolicited internal complaints, while three other circuits do not.

1. The Ninth Circuit was the first to construe Section 510 to protect unsolicited internal complaints. *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993). Like petitioner in this case, the plaintiff in *Hashimoto* was terminated after she brought potential ERISA violations to the attention of her supervisors and objected when directed to engage in conduct that would violate ERISA. *Id.* at 409-10. The Ninth Circuit held that the plaintiff's complaints constituted "giv[ing] information" within the protection of Section 510. *Id.* at 411. The court reasoned that "[t]he normal first step in giving information" about an ERISA violation "would be to present the problem first to the responsible managers of the ERISA plan." *Id.* If an employee is "then discharged for raising the problem, the process of giving information or testifying is interrupted at its start: the anticipatory discharge discourages the whistle blower before the whistle is blown." *Id.*

The Fifth Circuit reached the same conclusion in *Anderson v. Electronic Data Systems, Corp.*, 11 F.3d. 1311 (5th Cir. 1994). The plaintiff in that case – an employee responsible for administering pension plan

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Ninth Circuit could not have concluded that ERISA [complete] preemption applied without the determination that the former employee was qualified to assert ERISA participation protection. Thus, the pertinent *Hashimoto* language is not dictum, but controlling precedent.").

investments – was discharged after he objected to participating in ERISA violations and reported his concerns to company management. *Id.* at 1312-13. On appeal, the Fifth Circuit noted ERISA's broad prohibition on retaliation and held that the plaintiff's claim fell "squarely within the ambit of ERISA [Section] 510." *Id.* at 1314 (citations omitted).

A number of district courts in other circuits have adopted the same interpretation.[2]

So has the Department of Labor, the agency responsible for administering and enforcing Title I of ERISA.[3] *See* DOL C.A. Br. 5-6; DOL Br., *Nicolaou v. Horizon Media, Inc.*, *available at* 2004 WL 3525515. As the Department explained in its brief to the Third Circuit in this case, "[b]roadly but naturally construed, 'any inquiry or proceeding' encompasses plan participants' complaints to management or plan officials about wrongdoing, and the process by which that information is considered, however informal."

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[2] *See, e.g.*, *Dunn v. Elco Enter.*, No. 05-71801, 2006 WL 1195867, at *5 (E.D. Mich. May 4, 2006); *McSharry v. Unumprovident Corp.*, 237 F. Supp. 2d 875, 880-81 (E.D. Tenn. 2002).

[3] *See* 29 U.S.C. §§ 1132(a), 1135-36. In that role, the Secretary of Labor "may prescribe such regulations as he finds necessary or appropriate to carry out" Title I of ERISA. *Id.* § 1135. The Department also administers or enforces numerous other statutes containing anti-retaliation provisions. *See, e.g.*, 18 U.S.C. § 1514A(a)-(b) (Sarbanes-Oxley Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); *id.* § 660(c) (Occupational Safety and Health Act); *id.* § 1855(a)-(b) (Migrant and Seasonal Agricultural Worker Protection Act); 33 U.S.C. § 1367(a)-(b) (Clean Water Act); 49 U.S.C. § 31105 (Surface Transportation Assistance Act).

DOL C.A. Br. 16 (citations omitted). Otherwise, "employers could readily manipulate the applicability of section 510 by postponing proceedings or disregarding complaints, and even if formal proceedings were finally instituted, the whistleblower who serves as the catalyst for the proceedings would be wholly unprotected." DOL C.A. Br. 10.

2. "Faced with the same issue, the Fourth Circuit has . . . drawn the opposite conclusion," holding that Section 510 does not protect unsolicited internal complaints. Pet. App. 8a-9a (citing *King v. Marriot Int'l, Inc.*, 337 F.3d 421, 427-28 (4th Cir. 2003)). The plaintiff in *King* was a human resources manager who was discharged after she complained about, and refused to participate in, a plan to "transfer millions of dollars from [her employer's] medical plan into its general corporate reserve account." 337 F.3d at 423. King raised her objections to her supervisor and also requested an opinion letter from one of the company's in-house attorneys. *Id.*

The Fourth Circuit held that Section 510 provided King no protection because it covers only statements made in the course of a "legal or [an] administrative," process, "or at least something more formal than written or oral complaints made to a supervisor." *Id.* at 427. The court did not dispute that the word "inquiry" can be read more broadly, but concluded that the statute's additional "use of the phrase 'testified or is about to testify' . . . suggest[s] that the phrase 'inquir[ies] or proceeding[s]'" is limited to formal proceedings. *Id.* The court likewise recognized that the phrase "given information" was broader than "testified" but construed it as referring to "non-testimonial

information," such as "incriminating documents," turned over during a formal inquiry or proceeding. *Id.* The Fourth Circuit acknowledged that it was creating a split with the Fifth and Ninth Circuits, but it regarded those courts' decisions as "unpersuasive." *Id.* at 428.

In *Nicolaou v. Horizon Media*, 402 F.3d 325 (2d Cir. 2005) (per curiam), the Second Circuit likewise held that an employee-initiated internal complaint falls outside the protection of Section 510, but adopted a different rationale. Nicolaou was an employee-fiduciary who discovered that her employer was underfunding its ERISA-covered pension plan. *Id.* at 326. Within days after she reported this violation during a face-to-face meeting with the company's outside counsel and its president, she became the subject of "a campaign of retaliation" that culminated in her discharge. *Id.* at 329.

The Second Circuit agreed with the Fourth Circuit that an unsolicited internal complaint is not part of a "proceeding" because that term "refers to the progression of a lawsuit or other business before a court, agency, or other official body." 402 F.3d at 329. But it disagreed with the Fourth Circuit's conclusion hat an "inquiry" must be a formal proceeding as well. *Id.* at 330 n.3. "Whatever level of formality is implied by the term 'proceeding' . . . the use of the somewhat less formal term 'inquiry' in ERISA is indicative of an intent to ensure protection for those involved in the informal gathering of information.'" *Id.* at 328-29 (quoting DOL Br.). Thus, the court held, "the proper focus is not on the formality or informality of the circumstances under which an individual gives information." *Id.* at 330. The "plain meaning of

'inquiry,'" the court held, extends the statute's protection to "those involved in the informal gathering of information." *Id.* at 328-29.

That insight did not, however, lead the Second Circuit to conclude that Nicolaou had stated a claim simply because she complained to her supervisors about an ERISA violation. Having construed the word "inquiry" to "refer[] broadly to any request for information," 402 F.3d at 329, the court remanded to allow Nicolaou to "demonstrate that she was contacted to meet with [management] in order to give information" about possible ERISA violations. *Id.* at 330.

In a concurring opinion, Judge Pooler explained that limiting Section 510 to complaints made in the course of a formal proceeding would run contrary to ERISA's requirement that plan fiduciaries, like Nicolaou, investigate and take action to correct plan violations upon pain of personal liability. 402 F.3d at 330-31 (citing 29 U.S.C. §§ 1104(a)(1), 1105(a)(3), 1109(a)). Moreover, in light of that duty, she believed that an "inquiry" must include not only investigations initiated by an employer or outside entity, but also inquiries conducted by fiduciaries. *Id.* at 332.

In this case, the Third Circuit "agree[d] with the Fourth Circuit's decision in *King*" that a "plain reading" of Section 510 precludes protection for unsolicited internal complaints. Pet. App. 18a-19a. Like that court, the Third Circuit decided that "the phrase 'testified or is about to testify' implies that the phrase 'inquiry or proceeding' is limited to more formal actions." Pet. App. 13a. But it also agreed with the Second Circuit that "a plain reading of the

provision indicates that 'inquiry' includes only inquiries made of an employee, not inquiries made by an employee" or other employee-initiated complaints. *Id.* Because petitioner's objections were both informal and unsolicited, it held that Section 510 did not apply to this case. *Id.*

3. This case is an ideal vehicle for restoring uniformity to the law. The scope of Section 510's protection is squarely presented by the facts of this case: petitioner would have prevailed in the Fifth or Ninth Circuit, but would have lost in the Second and Fourth Circuits, based on a disagreement among these courts regarding the meaning of Section 510. Moreover, the scope of that provision was the sole question presented on appeal and was thoroughly considered with the benefit of extensive briefing by both the parties and the Department of Labor. Pet. App. 5a.

II. This Case Presents An Important And Recurring Issue Under ERISA.

Whether ERISA's anti-retaliation provision applies to unsolicited internal complaints is an important and recurring question.

1. As the longstanding and growing circuit conflict demonstrates, the scope of Section 510's protection is frequently litigated in the lower courts.[4]

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[4] *See, e.g.*, *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005); *King v. Marriott Int'l, Inc.*, 337 F.3d 421, 426-28 (4th Cir. 2003); *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1315 (5th Cir. 1994); *Hashimoto v. Bank of Hawaii*, 999 F.2d 408, 411-12 (9th Cir. 1993); *Momchilov v. McIlvaine Trucking*

That is hardly surprising given that the statute applies to pension and benefit plans that cover over 150 million people.[5] Eighty-six million actively participate in ERISA pension plans[6] and almost seventy percent of Americans who have health insurance receive it through an ERISA-governed plan.[7]

ERISA's protections thus remain vital to the effective provision of American retirement security and medical benefits. And the Act's anti-retaliation provision is essential to the statute's effectiveness, helping "to make [ERISA's] promises credible" by protecting the individuals who are often best situated

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Int'l, Inc., No. 5:09CV1322, 2010 WL 1254216 (Mar. 24, 2010 N.D. Ohio); *Ello v. Singh*, 531 F. Supp. 2d 552, 573 (S.D.N.Y. 2007); *Simons v. Midwest Tel. Sales & Serv. Inc.*, 462 F. Supp. 2d 1004, 1008 (D. Minn. 2006); *Dunn v. Elco Enter.*, No. 05-711, 2006 WL 1195867 (May 4, 2006 E.D. Mich.); *McSharry v. Unumprovident Corp.*, 237 F. Supp. 2d 875, 878-79 (E.D. Tenn. 2002); *Klein v. Banknorth Group, Inc.*, 977 F. Supp. 302, 304-305 (D. Vt. 1997); *Jorgensen v. Prudential Ins. Co. of Am.*, 852 F. Supp. 255, 262-63 (D.N.J. 1994); *McLean v. Carlson Cos., Inc.*, 777 F. Supp. 1480, 1483-84 (D. Minn. 1991).

[5] Department of Labor, Description of Employee Benefits Security Administration, *available at* http://www.dol.gov/ebsa/OEManual/main.html; *see also* 29 U.S.C. § 1001(a) (finding that ERISA plans directly affect "the continued well-being and security of millions of employees and their dependents").

[6] Department of Labor, Employee Benefits Security Administration, Private Pension Plan Bulletin, p. 3, June 2010, *available at* http://www.dol.gov/ebsa/PDF/2007pensionplan bulletin.PDF.

[7] *See* Report of the Congressional Budget Office 7, Table 2 (Mar. 18, 2010), *available at* http://www.cbo.gov/ftpdocs/113xx/doc11355/hr4872.pdf.

to identify and bring to light violations that can threaten the rights of thousands of workers and even the viability of an employer's benefit plan. *See Inter-Modal Rail Employees Ass'n v. Atchison, Topeka, Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997); *see also Ingersoll-Rand Co v. McClendon*, 498 U.S. 133, 143 (1990).

2. The inconsistent application of this critical component of ERISA's enforcement regime is untenable. Congress intended ERISA to replace a "patchwork scheme of regulation" by the states. *FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990) (citation omitted). Yet at present, employees are protected against retaliation for any unsolicited internal complaint in twelve states. In eight states, Section 510 applies only if the employee raises objections in a formal proceeding, such as a complaint to the Department of Labor or a lawsuit. And in two others, workers must show that they responded to an employer's questions and are not protected if they initiate an inquiry themselves.

Employees need to know whether they can safely bring their concerns to the attention of the company or, instead, must file a formal complaint with the Department of Labor or initiate litigation in order to secure legal protection against retaliation. The question is particularly important to plan fiduciaries, who have an obligation under ERISA to take action to correct any violation they discover. *See* 29 U.S.C. § 1109.

At the same time, varying interpretations of ERISA subject employers – particularly those operating national or regional employee benefit plans – to inconsistent rules, in conflict with Congress's intent to establish "a uniform regulatory regime over

employee benefit plans." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004).

Congress plainly did not intend to provide employees of the same firm dramatically different protection depending on whether they worked in the company's office in Los Angeles, New York, or Philadelphia. Nor did Congress intend to subject employers to varying standards of liability depending on the circuit in which they are sued. Yet, the existing division may encourage forum shopping to achieve precisely that result under ERISA's permissive venue provision. 29 U.S.C. § 1132(e)(2) (permitting plaintiffs to file suit "in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found").

III. ERISA's Anti-Retaliation Provision Protects Unsolicited Internal Reports Of Possible ERISA Violations.

Certiorari is also warranted because the decision below conflicts with the text and manifest purposes of ERISA. "[E]ffective enforcement" of a statute like ERISA can "only be expected if employees fe[el] free to approach officials with their grievances." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) (citation omitted). Accordingly, this Court has interpreted the text of analogous anti-retaliation provisions consistent with Congress's intent to ensure that employees are "completely free from coercion against reporting" unlawful practices. *NLRB v. Scrivener*, 405 U.S. 117, 121 (1972) (citation omitted). In this case, the Third Circuit made no pretense that its interpretation could be reconciled with these principles. It held instead that the plain

text of Section 510 required it to construe the provision in a manner that is ineffective to prevent even the most egregious employer retaliation. But that conclusion was wrong. In fact, the language easily permits, and the statutes' purposes demand, protection for all employees who make complaints regarding ERISA violations to their employers.

A. Nothing In The Text Of Section 510 Precludes Protection For Unsolicited Internal Complaints.

The language of Section 510 is broad and encompassing. The statute protects not only employees who "testify" in ERISA "proceedings," but also those who "give[] information" in "any inquiry" relating to an ERISA violation. 29 U.S.C. § 1140. The terms "information" and "inquiry" are expansive. An individual can "giv[e] information" through any number of methods – from having a face-to-face discussion to submitting formal complaint documents. The term "inquiry" is similarly sweeping. Accordingly, while an "inquiry" would certainly encompass formal proceedings or employer-initiated investigations, ordinary usage does not cabin the term to such a narrow meaning.

1. An "Inquiry" Encompasses An Internal Complaint.

The Third and Fourth Circuits have nonetheless construed the term "inquiry" as limited to "formal actions." Pet. App. 13a; *King*, 337 F.3d at 427. These courts assert that the phrase "inquiry or proceeding" must be interpreted in light of its proximity to the phrase "testified or is about to testify," which "connote[s] a formality that does not attend" to

"intra-company complaints." *King*, 337 F.3d at 427; *see also* Pet. App. 13a.

As the Second Circuit rightly observed, precisely the opposite inference arises from Congress's inclusion of the broad and colloquial words "information" and "inquiry," in addition to the more specific terms "proceeding" and "testimony." *Nicolaou*, 402 F.3d at 330 n.3. A statute must be read to "give the nouns their separate, normal meanings." *Garcia v. United States*, 469 U.S. 70, 73 (1984) (citation omitted). And in this case, "proceeding" – the narrower term – by itself encompasses a formal legal and administrative process. Lest it be rendered surplusage, the word "inquiry" must refer to something else.

Nor does the word "inquiry" naturally connote formality. Quite to the contrary, "the plain meaning of 'inquiry'" extends to an "informal gathering of information" as well as to more formal proceedings. *Nicolaou*, 402 F.3d at 328-29. *See, e.g.*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY at 646 (11th ed. 2001) (defining "inquiry" as an "examination into facts or principles"); *cf. also Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996) (referring to informal "employee inquiries" to plan fiduciaries); *Electro-Mech. Corp. v. Ogan*, 9 F.3d 445, 451 (6th Cir. 1993) ("ERISA imposes a duty upon fiduciaries to respond promptly and adequately to *employee-initiated inquiries* regarding the plan or any of its terms.") (emphasis added).

2. An "Inquiry" Includes An Employee-Initiated Communication.

Even setting aside formality, the Third Circuit also held that an "inquiry" must be initiated by

someone other than the employee herself, thereby excluding from protection unsolicited complaints. Pet. App. 13a. But that conclusion finds no support in the text of Section 510. Furthermore, it would lead to difficult line-drawing and absurd results Congress could not have intended.

By its terms, Section 510 applies to "*any* inquiry" related to a possible ERISA violation. 29 U.S.C. § 1140 (emphasis added). As this Court has explained, the modifier "any" "excludes selection or distinction." *Citizens' Bank v. Parker*, 192 U.S. 73, 81 (1904). When Congress uses the word "any" it "declares the [statutory phrase it modifies] without limitation." *Id.*; *see also City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 739 (1995) (Thomas, J., dissenting) (finding it "difficult to imagine what broader terms Congress could have used" than the term "any"). By inserting "any" before the term "inquiry," Congress thus confirmed that Section 510 would protect the full range of potential inquiries relating to ERISA.

This includes cases in which an employee conveys information in the course of conducting her own inquiry into possible ERISA violations. As in this case, it is not uncommon that employees with plan-related responsibilities may come to suspect that the plan is not being operated in accordance with ERISA's mandates. Indeed, employee-fiduciaries have a statutory obligation to monitor plan compliance, investigate possible violations, and take remedial action. 29 U.S.C. §§ 1104(a)(1), 1105(a)(3), 1109(a). When they fulfill those responsibilities by alerting their employer of questionable practices in the course of attempting to determine the plan's compliance with the law, they

have "given information . . . in an[] inquiry . . . relating to" ERISA, within any reasonable construction of those words. 29 U.S.C. § 1140.

The statute's language likewise encompasses employee complaints that could cause the employer to initiate an inquiry. In *NLRB v. Scrivener*, 405 U.S. 117 (1972), this Court considered a similar question under the National Labor Relations Act (NLRA). The NLRA prohibits retaliation against an employee because he has "filed charges or given testimony under this Act." 29 U.S.C. § 158. In *Scrivener*, a union filed a charge with the National Labor Relations Board, which sent an investigator to take statements from several employees, whom the employer then promptly fired.

Although the terminated employees had not filed any charges, and although they had not yet given any testimony, this Court held that the statute protected their conduct. 405 U.S. at 121-25. "The Act's reference . . . to an employee who 'has filed charges or given testimony[]' could be read strictly and confined in its reach to formal charges and formal testimony," the Court acknowledged. *Id.* at 122. But "[i]t can also be read more broadly." *Id.* "[T]extual analysis alone" revealed "an intent on the part of Congress to afford broad rather than narrow protection to the employee," consistent with the statute's "purpose and objective." *Id.* Accordingly, the Court rejected the court of appeals' conclusion that the word "testimony" did not encompass "preliminary preparations for giving testimony," such as providing information to an investigator. *Id.* at 121.

So, too, ERISA's protection for those who "give information in any inquiry" can and should be construed to extend to the entirety of the inquiry

process, including essential preliminary steps such as providing information regarding the need for an investigation.

c. The court of appeals' contrary narrow construction of "inquiry" leads to absurd results Congress could not have intended.

For one thing, the decision below calls into question whether complaints to the Department of Labor are protected. If "a plain reading" of the word "inquiry" necessarily "includes *only* inquiries made *of* an employee," as the Third Circuit held, Pet. App. 13a (emphasis added), it does not encompass an employee's unsolicited complaint to an outside agency, even one charged with enforcing the statute.

But even assuming the court of appeals would somehow find a way to protect complaints to the Government but not to an employer, many anomalies would nonetheless remain. The protection that ERISA affords cannot sensibly turn on whether an employee provides information in response to a question or on her own initiative. *Cf. Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 851 (2009) (describing as "freakish" a rule "protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question"). Nor could Congress have intended the statute's protections to depend on whether a supervisor responds to a complaint with a follow-up question or instead fires the complainant on the spot.

Moreover, the arbitrary distinctions the Third Circuit's decision draws would be entirely too difficult to administer in practice. Congress would not have contemplated that juries would spend their time

deciding whether a worker was fired for her initial complaint or for answering a follow-up question; or whether a supervisor (lawfully) fired the employee for lodging an initial complaint with the company, or instead (unlawfully) terminated her for repeating her complaint to the Government.[8]

B. The Third Circuit's Rule Contravenes The Purpose Of ERISA's Anti-Retaliation Provision.

In fact, limiting the protections of Section 510 to solicited or external complaints would frustrate the basic purposes of ERISA's anti-retaliation provision by providing perverse incentives for both employers and employees.

By excluding protection for unsolicited complaints, the majority's rule in this case would "permit[] (and perhaps, in essence, encourage[])" supervisors to "fire an employee immediately after she makes an informal complaint instead of conducting an investigation." Pet. App. 23a (Cowen, J., dissenting). This may be particularly true when the supervisor receiving the complaint, and terminating the employee, is responsible for the

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[8] To the extent the Court finds the text ambiguous, it should defer to the Department of Labor's interpretation. The Department – which has primary enforcement and regulatory authority under Title I of ERISA, *see* 29 U.S.C. §§ 1132, 1135-36 – has construed Section 510 to protect employee-initiated internal complaints. *See* DOL C.A. Br. 5-6; DOL Br., *Nicolaou v. Horizon Media, Inc.*, 2004 WL 3525515. That consistent position warrants deference. *See generally United States v. Mead Corp.*, 533 U.S. 218 (2001); *see also id.* at 256-57 (Scalia, J., dissenting).

violation and risks termination himself if the violation comes to light.

Employees like petitioner are often a company's best resource for preventing and remedying breaches of ERISA because they have direct knowledge of the company's practices. The decision here, however, may often prevent a company's upper management or owners from learning of problems at an early stage when they may be more readily and inexpensively remedied. That frustrates the statute's general intent to prevent violations and encourage voluntary compliance. *See* H.R. Rep. No. 93-533, at 17 (1974).

Moreover, by construing Section 510 to protect only complaints made outside the company, the decision below encourages workers to file complaints with the Department of Labor or to proceed directly to court. But complaining to the Department of Labor can be ineffective, as the Department of Labor "simply does not have the resources to monitor all alleged ERISA violations." DOL C.A. Br. 22. Moreover, even when undertaken, a Department of Labor investigation imposes significant expense on employers, creates friction within the workplace, and can often delay resolution of ERISA disputes that could be been resolved internally. In these respects, private lawsuits are even worse, imposing great expense and delay to resolve ERISA disputes that often could have been easily resolved through a simple conversation with the employer.

Worse yet, the decision below inevitably will discourage many employees from reporting ERISA violations at all, to the detriment of plan participants

and their families and, ultimately, the larger community.[9]

* * * * *

Stripped of any pretense that its narrow construction of ERISA's anti-retaliation provision is the only one permitted by the text of the statute, the Third Circuit's interpretation of Section 510 quickly collapses under the weight of common sense and congressional purpose. This Court should not permit that error to continue to propagate among the circuits.

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[9] Left undiscovered, serious ERISA violations can jeopardize the very solvency of pension and benefit plans, imposing significant costs on other plans through increased insurance premiums to the Pension Benefits Guaranty Corporation (PBGC), the federal agency that insures ERISA defined-benefit pensions. And while the PBGC typically relies on insurance-premium revenue and not tax revenues to guarantee underfunded pensions, PBGC recognizes some potential for a taxpayer-funded bailout. *See* Understanding the Financial Condition of the Pension Insurance Program, *available at* http://www.pbgc.gov/media/key-resources-for-the-press/content/page15247.html.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 30, 2010

APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-3198

SHIRLEY EDWARDS, Appellant

v.

A.H. CORNELL AND SON, INC., D/B/A AH CORNELLS; MELISSA CLOSTERMAN; SCOTT A. CORNELL

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(District Court No. 09-cv-1184)
District Judge: The Honorable J. Curtis Joyner

Argued April 13, 2010

Before: FISHER, HARDIMAN, and COWEN, *Circuit Judges*

(Filed: June 24, 2010)

Justin L. Swidler (Argued)
Bensalem, PA
Counsel for Appellant

Walter H. Flamm, Jr. (Argued)
Blue Bell, PA
Counsel for Appellees

Eric C. Lund (Argued)
Washington, D.C.
Counsel for Amicus Curiae, Secretary of Labor

OPINION OF THE COURT

FISHER, Circuit Judge.

Shirley Edwards filed suit against her employer, A.H. Cornell and Son, Inc. ("A.H. Cornell"), and supervisors, Scott A. Cornell and Melissa J. Closterman, claiming that she was terminated in violation of Section 510 of the Employee Retirement Income Security Act of 1974 ("ERISA") and state common law after complaining to management about alleged ERISA violations. The defendants filed a Rule 12(b)(6) motion to dismiss, and the District Court granted the motion, holding that Edwards's complaints were not part of an "inquiry or proceeding" and thus not protected under Section 510. On appeal, we are presented with a single issue of first impression for this Court: whether the anti-retaliation provision of Section 510 of ERISA, 29 U.S.C. § 1140, protects an employee's unsolicited internal complaints to management. Four federal Courts of Appeals have ruled on this issue: the Fifth and Ninth Circuits have held in the affirmative, and the Second and Fourth Circuits have held in the negative. We agree with the latter, and hold that unsolicited internal complaints are not protected.

I.

A.[1]

Defendant A.H. Cornell is a family-owned company that provides commercial and residential

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[1] Because Edwards appeals from a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, the facts pled by Edwards in her complaint are assumed to be true. *See Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009).

construction services. In March 2006, A.H. Cornell hired Plaintiff Edwards to serve as its Director of Human Resources and to establish a human resources department. Defendant Cornell, an A.H. Cornell executive, oversaw the terms and conditions of Edwards's employment, and Defendant Closterman, who managed the company's daily operations, acted as Edwards's supervisor. Edwards was employed by A.H. Cornell for a total of nearly three years. As an employee, Edwards participated in the company's group health insurance plan, which was governed by ERISA.

Edwards claims that she discovered, during the last weeks of her employment, that A.H. Cornell was engaged in several ERISA violations: the company was allegedly administering the group health plan on a discriminatory basis, misrepresenting to some employees the cost of group health coverage in an effort to dissuade employees from opting into benefits, and enrolling non-citizens in its ERISA plans by providing false social security numbers and other fraudulent information to insurance carriers. Edwards alleges that she "objected to and/or complained to" A.H. Cornell's management about these ERISA violations and was terminated on or around February 11, 2009, as a result. (App. at 26, ¶ 33.) According to Edwards, Closterman was directly responsible for her termination, and Cornell participated.

B.

On March 18, 2009, Edwards filed a complaint in the United States District Court for the Eastern District of Pennsylvania against A.H. Cornell, Cornell,

and Closterman, asserting an anti-retaliation claim under Section 510 of ERISA and common law wrongful discharge. On May 18, 2009, the defendants filed a motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that Edwards had not engaged in a protected activity under Section 510.

The District Court granted the motion to dismiss on July 23, 2009. After examining the circuit split on this issue, the District Court determined that the Second Circuit's analysis in *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005) (per curiam), was persuasive and held that Edwards failed to state a claim upon which relief could be granted because her alleged objections and/or complaints to management were not part of an "inquiry or proceeding":

> "Plaintiff does not allege that anyone requested information from her or initiated contact with her in any way regarding the alleged ERISA violations. Nor does she allege that she was involved in any type of formal or informal gathering of information. She states merely that she objected to or complained about certain conduct by Defendants."

(App. at 13-14 (citations omitted).) Having dismissed Edwards's ERISA claim, the District Court declined to exercise supplemental jurisdiction over Edwards's state law claim for wrongful discharge.

Edwards timely appealed, and the Secretary of Labor filed a brief as amicus curiae in support of Edwards's position.

II.

The District Court had jurisdiction under 28 U.S.C. § 1331, and we have jurisdiction pursuant to 28 U.S.C. § 1291. "We review de novo the District Court's dismissal of an action under Rule 12(b)(6)." *Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co.*, 579 F.3d 304, 307 (3d Cir. 2009) (emphasis omitted). Pursuant to *Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009), district courts must conduct a two-part analysis when presented with a motion to dismiss. *Fowler v. UPMC Shadyside,* 578 F.3d 203, 210 (3d Cir. 2009). "First, the factual and legal elements of a claim should be separated." *Id.* "The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions." *Id.* at 210-11. "Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" *Id.* at 211 (quoting *Iqbal,* 129 S. Ct. at 1950).

III.

The sole issue on appeal is whether the District Court erred in holding that unsolicited internal complaints are not protected activities under the anti-retaliation provision of Section 510 of ERISA, 29 U.S.C. § 1140.[2] We will affirm.

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[2] Edwards also contends, citing a single district court opinion, that she is protected under a separate clause of Section 510, which provides,

> "It shall be unlawful for any person to discharge ... a participant or beneficiary for exercising any right to

A. Background

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S. Ct. 2890, 77 L.Ed.2d 490 (1983). "The statute imposes participation, funding, and vesting requirements on pension plans. It also sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans." *Id.* at 91, 103 S. Ct. 2890. As part of this system, "Congress included various safeguards to preclude abuse and 'to completely secure the rights and expectations brought into being by this landmark reform legislation.'" *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 137, 111 S. Ct. 478, 112 L.Ed.2d 474 (1990) (quoting S. Rep. No. 93-127, at 36 (1973), 1974 U.S.C.C.A.N. 4838). One such safeguard is ERISA's anti-retaliation or "whistleblower" provision, which provides as follows:

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which he is entitled under the provisions of an employee benefit plan, [or] this subchapter, ... or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, [or] this subchapter[.]"

29 U.S.C. § 1140. (*See also* Edwards Br. at 15-16.) Since Edwards failed to raise this argument in the District Court, it is waived. *See DIRECTV Inc. v. Seijas*, 508 F.3d 123, 125 n. 1 (3d Cir. 2007) ("It is well established that arguments not raised before the District Court are waived on appeal.").

> "It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act."

29 U.S.C. § 1140. Put simply, the purpose of the provision is to "proscribe[ ] interference with rights protected by ERISA." *Ingersoll-Rand Co.*, 498 U.S. at 137, 111 S. Ct. 478.

B. The Circuit Split

The federal Courts of Appeals are split on whether Section 510 encompasses unsolicited internal complaints. The Fifth and Ninth Circuits have held in the affirmative, *see Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311 (5th Cir. 1994), and *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993), while the Second and Fourth Circuits have held in the negative, *see Nicolaou*, 402 F.3d 325, and *King v. Marriott Int'l Inc.*, 337 F.3d 421 (4th Cir. 2003).

The Ninth and Fifth Circuits were the first circuits to consider the issue. In each case, the plaintiff employee filed a complaint under state law alleging wrongful discharge for complaining to supervisors about alleged ERISA violations.[3] *Hashimoto*, 999 F.2d at 409-10; *Anderson*, 11 F.3d at 1312-13. Finding that Section 510 of ERISA already provided employees with

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[3] The employee in *Anderson* also claimed that he was discharged for refusing to commit acts in violation of ERISA. 11 F.3d at 1312-13.

a remedy, the Ninth Circuit held that the employee's state law claim was completely preempted by ERISA and remanded the case to allow the state claim to be re-characterized as a federal cause of action. *Hashimoto*, 999 F.2d at 411-12. The court explained that the failure of Section 510 to protect internal complaints would, in practice, inhibit the effectiveness of the anti-retaliation provision:

> "The normal first step in giving information or testifying in any way that might tempt an employer to discharge one would be to present the problem first to the responsible managers of the ERISA plan. If one is then discharged for raising the problem, the process of giving information or testifying is interrupted at its start: the anticipatory discharge discourages the whistle blower before the whistle is blown."

Id. at 411. Shortly thereafter, the Fifth Circuit arrived at the same conclusion in *Anderson*, holding that a state law claim for wrongful discharge was preempted by ERISA in part "because the cause of action would conflict with the enforcement provisions of §§ 502(a) and 510 of ERISA." 11 F.3d at 1314. The court further explained, in broad terms, "[the employee's] claim falls squarely within the ambit of ERISA § 510[,]" which "addresses discharges for exercising ERISA rights or for the purpose of interfering with the attainment of ERISA rights, as well as discharges for providing information or testimony relating to ERISA." *Id.* (quotations and citations omitted).

Faced with the same issue, the Fourth Circuit has since drawn the opposite conclusion, holding that an employee's state law wrongful discharge claim is not

preempted by ERISA because Section 510 does not protect unsolicited internal complaints. *King*, 337 F.3d at 427-28. Focusing on "the proper scope of the phrase 'inquiry or proceeding,'" the court analogized Section 510 to the anti-retaliation provision in the Fair Labor Standards Act (FLSA)[4]:

> "In the instant case, as well, the use of the phrase 'testified or is about to testify' does suggest that the phrase 'inquir[ies] or proceeding[s]' referenced in section 510 is limited to the legal or administrative, or at least to something more formal than written or oral complaints made to a supervisor. The phrase 'given information' does no more than insure that even the provision of non-testimonial information (such as incriminating documents) in an inquiry or proceeding would be covered. And, here as well [ ], the anti-retaliation provision in section 510 is much narrower than the equivalent [in Title VII.][5]"

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[4] Section 15(a)(3) of the FLSA provides that it is unlawful for any person

> "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee[.]"

29 U.S.C. § 215(a)(3). In *Ball v. Memphis Bar-B-Q Co., Inc.*, 228 F.3d 360 (4th Cir. 2000), the Fourth Circuit held that Section 15(a)(3) does not protect internal complaints. *Id.* at 364. This is the minority view. *See* note 8, *infra*.

[5] Section 704(a) of Title VII provides,

Id. at 427 (first and second alterations in original; footnote 5 supplied). The Fourth Circuit found that the Ninth and Fifth Circuit decisions in *Hashimoto* and *Anderson*, respectively, were not persuasive. According to the court, the Ninth Circuit in *Hashimoto* improperly "reject[ed] the most compelling interpretation of the statutory language for a 'fair' interpretation," and the Fifth Circuit in *Anderson* "merely recited section 510 without even addressing the facial inapplicability of section 510 to intra-office complaints." *Id.* at 428.

The sole federal Court of Appeals to address this issue in the context that we are presented with here – where an employee actually brings suit under Section 510 of ERISA itself – is the Second Circuit in *Nicolaou*. 402 F.3d at 327. Unlike the Fourth Circuit in *King*, the Second Circuit found that Section 510 of ERISA is "unambiguously broader in scope" than its counterpart in the FLSA. *Id.* at 328. Nevertheless, the court held that unsolicited internal complaints are not protected activities. First, the court explained that internal complaints could not fall under the term "proceeding" because "proceeding" "refers to the progression of a lawsuit or other business before a court, agency, or other official body[.]" *Id.* at 329. Second, the court held that, for an internal complaint to constitute an

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"It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."
42 U.S.C. § 2000e-3(a).

"inquiry," the employee would need to "demonstrate that she was contacted to meet with [management] in order to give information about the alleged [ERISA violation.]" *Id.* In other words, the employee's complaint would need to have been solicited.[6]

C. The Plain Meaning of Section 510

We begin our analysis of ERISA's anti-retaliation provision "with an examination of ERISA's statutory language because 'absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" *Wolk v. Unum Life Ins. of Am.*, 186 F.3d 352, 355 (3d Cir. 1999) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno,* 494 U.S. 827, 835, 110 S. Ct. 1570, 108 L.Ed.2d 842 (1990)) (other quotations and citations omitted). Therefore, "the first step is to determine whether [Section 510] has a plain and unambiguous meaning." *Dobrek v. Phelan*, 419 F.3d 259, 263 (3d Cir. 2005). Words or provisions are ambiguous when "'they are reasonably susceptible of different interpretations.'" *Id.* at 264 (quoting *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 473 n. 27, 105 S. Ct. 1441, 84 L.Ed.2d 432 (1985)). If there is an ambiguity, we look to "the surrounding words and provisions and also to the words in context." *Id.*

To reiterate, Section 510 of ERISA provides as follows:

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[6] Although its analysis was more nuanced with regard to the term "inquiry," the *Nicolaou* court did not view its holding to be in conflict with the Fourth Circuit's decision in *King*. *See Nicolaou*, 402 F.3d at 330.

> "It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act."

29 U.S.C. § 1140. Since Edwards has undoubtedly "given information" by objecting and/or complaining to management, at issue in this appeal is whether or not Edwards did so in any "inquiry or proceeding." The Secretary of Labor argues, in its brief as amicus curiae, that "[b]roadly but naturally construed, 'any inquiry or proceeding' encompasses plan participants' complaints to management or plan officials about wrongdoing, and the process by which that information is considered, however informal." (Secretary Br. at 16.) We disagree.

An "inquiry" is generally defined as "[a] request for information." Black's Law Dictionary 864 (9th ed.2009). Here, Edwards does not allege that anyone approached her requesting information regarding a potential ERISA violation. Rather, she made her complaint voluntarily, of her own accord. Under these circumstances, the information that Edwards relayed to management was not part of an inquiry under the term's plain meaning.

On appeal, Edwards argues that her objections and/or complaints were themselves the inquiry. We disagree. Edwards's complaints were statements regarding potential ERISA violations, not questions seeking information. Furthermore, because § 1140 protects employees that have "given information," not

employees that have "received information," a plain reading of the provision indicates that "inquiry" includes only inquiries made of an employee, not inquiries made by an employee. The fact that Edwards's complaints may have eventually "culminat[ed]" in an inquiry, (*see* Secretary Br. at 17), underscores the fact that the complaints themselves, without more, do not constitute an inquiry.

Neither is Edwards's conduct encompassed by the term "proceeding." A "proceeding" is commonly defined as "[t]he regular and orderly progression of a lawsuit" or the "procedural means for seeking redress from a tribunal or agency." Black's Law Dictionary 1324 (9th ed. 2009). Here, there is no suggestion that any such formal action has occurred.[7]

In so holding, we follow the Fourth Circuit's opinion in *King*. As the *King* court noted, even beyond the plain meaning of "inquiry" and "proceeding," the phrase "testified or is about to testify" implies that the phrase "inquiry or proceeding" is limited to more formal actions. *See King*, 337 F.3d at 427. Not all anti-retaliation statutes are so limited. In drafting § 1140, Congress could have used broad language similar to that present in the anti-retaliation provision in Section 704(a) of Title VII, which extends broad protection to employees that have "opposed any practice made an unlawful employment practice by [Title VII.]" 42

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[7] As it is not necessary for the disposition of this case, we decline to elaborate on the level of formality required for protection under Section 510. At the very least, the provision would protect information given in legal and administrative proceedings.

U.S.C. § 2000e-3(a). Congress declined to do so, and, like the court in *King*, we find this choice to be persuasive. *See King*, 337 F.3d at 427. Finally, we agree with the Fourth Circuit that the Ninth and Fifth Circuit opinions in *Hashimoto* and *Anderson*, respectively, are not compelling. Neither court examined the statutory language of Section 510 in detail: the Fifth Circuit gave the issue cursory treatment, *see Anderson*, 11 F.3d at 1314, and the Ninth Circuit appeared to focus its analysis on the adoption of a "fair" interpretation, *see Hashimoto*, 999 F.2d at 411. *See also King*, 337 F.3d at 428.

Edwards and the Secretary argue that we should give Section 510 a broader reading because ERISA is a remedial statute. This connection is lacking. Although ERISA "should be liberally construed in favor of protecting the participants in employee benefit plans," *see IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 127 (3d Cir. 1986), this does not entitle us to ignore clear statutory language. *See Wolk*, 186 F.3d at 355 ("[A]bsent a clearly expressed legislative intention to the contrary, [ERISA's statutory] language must ordinarily be regarded as conclusive." (quotations and citations omitted)). If Section 510 were ambiguous, we would construe the provision in favor of plan participants. However, as discussed above, we find the provision's plain meaning to be clear.

Likewise, Edwards and the Secretary argue that Section 510 deserves a broader reading because the failure to protect unsolicited internal complaints would undermine the provision's purpose, as "it would permit an employer to terminate an employee upon

the employee first notifying the employer of the ERISA violation[.]" (Edwards Br. at 14.) This contention must also fail. Presented as we are with clear statuary language, we do not need to speculate as to Congress's intent. It suffices to note that, had Congress been concerned with such a scenario, Congress could have used broad language mirroring the anti-retaliation provision of Title VII. Congress chose not to do so.

D. Analogous Third Circuit Precedent

Contrary to the assertions of Edwards and the Secretary, the conclusion that Section 510 of ERISA does not protect unsolicited internal complaints does not conflict with our prior case law regarding anti-retaliation statutes. Edwards and the Secretary cite two opinions to that effect: *Brock v. Richardson*, 812 F.2d 121 (3d Cir. 1987), which addresses the scope of Section 15(a)(3) of the FLSA, and *Passaic Valley Sewerage Commissioners v. United States Department of Labor*, 992 F.2d 474 (3d Cir. 1993), which addresses the scope of Section 507(a) of the Clean Water Act (CWA). Neither case is controlling here.

Brock is distinguishable because it concerned a different issue in the context of a different statute. We examined in *Brock* whether "an employer's [mistaken] belief that an employee has engaged in protected activity is sufficient to trigger application" of the anti-retaliation provision of the FLSA, and held in the affirmative. 812 F.2d at 123. We did not address whether Section 15(a)(3) of the FLSA protects internal complaints. There is a circuit split on this

issue, which we have not yet joined.[8]

Even if we had held in *Brock* that internal complaints are protected under the FLSA, that conclusion would not be dispositive here. Section 15(a)(3) of the FLSA and Section 510 of ERISA are not identical. Section 15(a)(3) of the FLSA extends broadly to persons that have "filed any complaint," without explicitly stating the level of formality required. 29 U.S.C. § 215(a)(3). Section 510 of ERISA, in contrast, extends only to persons that have "given information or [ ] testified" in an "inquiry or proceeding." 29 U.S.C. § 1140. The word "complaint" is not even used. Therefore, the conclusion that internal complaints are protected under the FLSA does not require a parallel conclusion under ERISA's distinct statutory language.

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[8] The First, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have held that internal complaints are protected under the FLSA. *See Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 626 (5th Cir. 2008); *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999) (en banc); *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 41 (1st Cir. 1999); *E.E.O.C. v. Romeo Cmty. Sch.*, 976 F.2d 985, 989 (6th Cir. 1992); *E.E.O.C. v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975). The Second and Fourth Circuits have held to the contrary. *See Ball*, 228 F.3d at 364; *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993). Finally, the Seventh Circuit has taken a middle approach. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 838, 840 (7th Cir. 2009) (holding that written, but not oral, internal complaints are protected based on the inclusion of the verb "filed"), *cert. granted,* --- U.S. ----, 130 S. Ct. 1890, 176 L.Ed.2d 361 (2010). We have cited the majority approach with approval in dicta. *See Brock*, 812 F.2d at 124.

Passaic Valley provides a closer comparison. In *Passaic Valley,* we examined, as here, whether intracorporate complaints are protected under Section 507(a) of the CWA. 992 F.2d at 477. Section 507(a) provides as follows:

> "No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter."

33 U.S.C. § 1367(a). We held in *Passaic Valley* that the term "proceeding" within Section 507(a) is ambiguous: "The term may reasonably be invoked to encompass a range of complaint activity of varying degrees of formal legal status." 992 F.2d at 478. Accordingly, we gave *Chevron* deference to the Secretary of Labor's Final Decision and Order and held that intracorporate allegations are protected under the CWA. *Id.* at 478-80.

Although it might appear so at first glance, *Passaic Valley* is not dispositive here for a couple of reasons, not the least of which is that *Passaic Valley* addresses Section 507(a) of the CWA, not Section 510 of ERISA. First, to preclude an expansive use of our holding, we did not state in *Passaic Valley* that the term "proceeding" is necessarily ambiguous in all anti-retaliation provisions. Rather, we expressly

stated that the term "proceeding" is ambiguous "*within* § 507(a) of the Clean Water Act[.]" *Id.* at 478 (emphasis added). In so holding, we avoided the rote application of *Passaic Valley* in other contexts, such as that of Section 510 of ERISA.

Second, we gave *Chevron* deference in *Passaic Valley* to the Secretary of Labor's "reasonably permissive construction" that "all good faith intracorporate allegations are fully protected from retaliation under § 507(a)[.]" *Id.* at 480. Contrary to the Secretary's suggestion here, we do not likewise owe *Chevron* deference to the Secretary's allegedly consistent reading of Section 510. Although the Department of Labor is the federal agency in charge of overseeing ERISA, *see Mack Boring & Parts v. Meeker Sharkey Moffitt, Actuarial Consultants*, 930 F.2d 267, 276 (3d Cir. 1991), we do not apply *Chevron* deference to "agency litigat[ion] positions that are wholly unsupported by regulations, ruling, or administrative practice," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212, 109 S. Ct. 468, 102 L.Ed.2d 493 (1988). In *Passaic Valley,* we relied on the Secretary's Final Decision and Order. 992 F.2d at 477. Here, in contrast, the Secretary has not pointed to any regulations, rulings, or other material in support of its position.

Therefore, rather than base our holding on our prior case law regarding Section 507(a) of the CWA, we will ground our decision in the plain meaning of Section 510 of ERISA itself.

IV.

In summary, we agree with the Fourth Circuit's

decision in *King* that unsolicited internal complaints are not protected under Section 510 of ERISA, 29 U.S.C. § 1140, based on a plain reading of that provision's terms. We will accordingly affirm the order of the District Court.[9]

COWEN, Circuit Judge, dissenting.

Unlike the Court, I conclude that ERISA's anti-retaliation provision does indeed protect "an employee's unsolicited internal complaints to management." Accordingly, I must respectfully dissent.

The majority is obviously correct that the statutory interpretation process must begin with the actual language of Section 510. Specifically, the statutory language at issue is generally regarded as conclusive, at least in the absence of a clearly expressed legislative intention to the contrary. *See, e.g.*, *Wolk v. UNUM Life Ins. of Am.*, 186 F.3d 352, 355 (3d Cir. 1999). I further agree with the majority that "the first step is to determine whether [Section 510] has a plain and unambiguous meaning." *Dobrek v. Phelan*, 419 F.3d 259, 263 (3d Cir. 2005) (citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S. Ct. 941, 151 L.Ed.2d 908 (2002)). I, however, believe that the statutory language used in this anti-retaliation provision is *ambiguous*. In

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[9] In light of our disposition, we decline to address A.H. Cornell's additional arguments that Edwards cannot maintain a claim against Cornell and Closterman because they "merely served as the company's agents," (A.H. Cornell Br. at 7), and that, regardless of the outcome of this appeal, the allegations in Edwards's complaint fail to satisfy the pleading requirements articulated by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007).

fact, as explained below, I find it highly doubtful that Congress could have ever intended for its anti-retaliation provision to apply in the manner suggested by the majority, in particular because the majority's interpretation leaves totally unprotected a certain category of conduct (as well as the employees who may engage in such conduct) that this remedial statutory provision was enacted to protect in the first place. *See, e.g.*, *Disabled in Action of Pa. v. Southeastern Pa. Transp. Auth.*, 539 F.3d 199, 210 (3d Cir. 2008) (stating that we "avoid constructions that produce 'odd' or 'absurd results' or that are 'inconsistent with common sense'" (quoting *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454, 109 S. Ct. 2558, 105 L.Ed.2d 377 (1989); 2A N. Singer, *Sutherland Statutes and Statutory Construction* § 45:12, at 92 (6th ed. 2000))).

Initially, the majority does acknowledge at least some of the broad considerations underlying ERISA and its anti-retaliation provision, but it generally fails to give these various considerations the weight they deserve. Accordingly, the majority recognizes that ERISA, as a remedial statute, "should be liberally construed in favor of protecting the participants in employee benefit plans." *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 127 (3d Cir. 1986) (citations omitted). It likewise states that: (1) ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries, *see, e.g.*, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S. Ct. 2890, 77 L.Ed.2d 490 (1983); (2) the statute imposes different standards and requirements with respect to the operation of the plans themselves; *id.* at 91, 103 S. Ct. 2890; (3) Congress similarly included various safeguards in order to deter abuse and "'to

completely secure the rights and expectations brought into being by this landmark reform legislation,'" *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137, 111 S. Ct. 478, 112 L.Ed.2d 474 (1990) (quoting S.Rep. No. 93-127, at 36 (1973)); and (4) Section 510, designed to eliminate interference with the rights protected by ERISA, represents one of these critical statutory safeguards, *id.* I further note that "Congress viewed this section as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits." *Id.* at 143, 111 S. Ct. 478 (citing S. Rep. No. 93-127, at 35-36; H.R. Rep. No. 93-533, at 17 (1973)). In other words, this anti-retaliation provision plays a very important and even essential role in the proper implementation of the whole ERISA scheme because it actually "'helps to make [ERISA's] promises credible.'" *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515, 117 S. Ct. 1513, 137 L.Ed.2d 763 (1997) (quoting *Heath v. Varity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995)).

Far from liberally construing this remedial legislation in favor of the very persons it was designed to protect, the majority adopts an ultimately unsustainable interpretation. At least at times, it appears to follow the very narrow approach adopted by the Fourth Circuit in *King v. Marriott International, Inc.*, 337 F.3d 421 (4th Cir. 2003), as opposed to the more moderate position taken by the Second Circuit in *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005) (per curiam). However, even the Second Circuit disagreed with the Fourth Circuit's belief "that Congress's use of the phrase 'testify or about to testify' dictates" the conclusion "that Section 510 protects those who engage in 'something more formal than written or

oral complaints made to a supervisor.'" *Id.* at 330 n. 3 (quoting *King*, 337 F.3d at 427). The *Nicolaou* court quite properly read this "reference to testimony" language as "wholly irrelevant to our understanding of the language 'given information . . . in any inquiry or proceeding.'" *Id.*

More broadly, I acknowledge that the Fifth Circuit did not examine this issue in any real detail in its ruling in *Anderson v. Electronic Data Systems Corp.*, 11 F.3d 1311 (5th Cir. 1994). On the other hand, the majority itself quotes the Ninth Circuit's reasonable and ultimately persuasive explanation for why it concluded in *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993), that Section 510 does, in fact, encompass internal workplace complaints. It bears repeating here:

> . . . . The normal first step in giving information or testifying in any way that might tempt an employer to discharge one would be to present the problem first to the responsible managers of the ERISA plan. If one is then discharged for raising the problem, the process of giving information or testifying is interrupted at its start: the anticipatory discharge discourages the whistle blower before the whistle is blown.

Id. at 411. Like the Ninth Circuit, I find it difficult to believe that Congress could have ever intended to exclude from the protection of its remedial anti-retaliation provision employees who are terminated because they bring an ERISA-related problem to the attention of their superiors.

Likewise, the majority's narrow interpretation of the specific term "inquiry" appears questionable at best. In

addition to leaving the crucial "first step" unprotected, the Second Circuit's whole "inquiry" standard could be difficult to apply and even unworkable in certain circumstances. Certain conduct may clearly constitute an "inquiry," such as the plaintiff's alleged activities in *Nicolaou* itself, which included contacting her employer's outside attorney regarding an alleged underfunding problem and then, after the lawyer conducted an inquiry of his own and evidently at the request of the lawyer, meeting with both him and the president of the company. *Nicolaou,* 402 F.3d at 326-27, 329-30. On the other hand, an internal workplace complaint would quite naturally constitute a preliminary step before a formal or informal inquiry is launched (and such a complaint may even have been necessary to trigger the investigation in the first place). However, where does one draw the line between such an initial step, which the Second Circuit and majority have held is not protected by the statutory provision, and otherwise "protected" statements purportedly made as part of some sort of inquiry? For instance, suppose an employee like Edwards complains to her superior, the superior asks some follow-up questions, and the employee responds to these questions. Are the informal responses to some impromptu questions to be regarded as protected because they evidently were made as part of an "inquiry?" In turn, why should such responses be protected while, at the same time, an employer is essentially permitted (and perhaps, in essence, encouraged) to fire an employee immediately after she makes an informal complaint instead of conducting an investigation of some sort?

In addition, the majority goes on to hold that Section 510 only protects employees who give

information as part of the inquiry, as opposed to those individuals who actually conduct the inquiry and thereby "received information." Admittedly, the Second Circuit in *Nicolaou* did deal with a plaintiff who had, inter alia, been invited to attend a meeting with both the president and outside counsel and stated her opinion that a 401(k) plan was underfunded. *Id.* Nevertheless, the majority's approach appears to be highly questionable at best insofar as it leaves an entire class of employees, who, given their responsibility to conduct potentially sensitive and damaging investigations into possible ERISA violations and related matters, would need protection from retaliation even more than employees who merely answers some questions.

Even though these various considerations clearly weigh in favor of the more expansive interpretation offered by the Fifth and Ninth Circuits, Edwards, and the Secretary, I might still be inclined to agree with the majority's ultimate result here based on the language actually used in the statutory provision. Nevertheless, analogous Third Circuit decisions clearly indicate that the language in Section 510 is ambiguous and that this Court should, in turn, interpret such language as encompassing internal workplace complaints.

As a general matter, I recognize that the case law addressed different statutes using different statutory language, and these decisions accordingly do not represent technically binding precedents at this juncture. The fact that Congress has chosen to use different terms in different anti-retaliation provisions should also not be overlooked. Accordingly, I do not suggest that Section 510 should be interpreted as

broadly as its Title VII counterpart, which, among other things, expressly covers employees who have "opposed any practice made an unlawful employment practice by [Title VII.]" 42 U.S.C. § 2000e-3(a). Nevertheless, this Court obviously should strive to treat relatively similar statutory provisions, contained in similar remedial federal statutes, in a clear and consistent fashion. In any case, as highlighted below, at least some of the terms used in Section 510 are actually more expansive than the equivalent terms contained in other anti-retaliation provisions.

I start with a case that actually held that the term "proceeding" is ambiguous and gave *Chevron* deference to the Secretary's formal determination that intracorporate complaints are, in fact, protected activities: *Passaic Valley Sewerage Commissioners v. United States Department of Labor*, 992 F.2d 474 (3d Cir. 1993).

The *Passaic Valley* Court held that the statutory term "proceeding," which is contained in both the CWA provision and its ERISA counterpart, is "ambiguous" because it "may reasonably be invoked to encompass a range of complaint activity of varying degrees of formal legal status." *Id.* at 478. It then added "that the [CWA's] purpose and legislative history allow, and even necessitate, extension of the term 'proceeding' to intracorporate complaints." *Id.* In other words, the protection provided by the section "would be largely hollow if it were restricted to the point of filing a formal complaint with the appropriate external law enforcement agency." *Id.* "Employees should not be discouraged from the normal route of pursuing internal remedies before going public with their good faith

allegations." *Id.* Instead, they should be encouraged to notify management of their observations before any formal investigations and litigation are initiated, thereby providing management with the opportunity to correct, justify, or clarify policies or otherwise facilitate prompt remediation and compliance. *Id.* at 478-79. Furthermore, an employee's non-frivolous complaint should not have to be guaranteed to withstand the scrutiny of review before meriting legal protection "for the obvious reason that such a standard would chill employee initiatives in bringing to light perceived discrepancies in the workings of their agencies." *Id.* at 479. In addition, the Court in *Passaic Valley* observed that "the whistle-blower provision of the Clean Water Act mirrors that of several other federal environmental, safety and energy statutes," which have also been broadly construed in the case law. *Id.* (footnote omitted) Therefore, "[a]lthough the present case is the first to present us with this issue in the context of the Clean Water Act, the weight of other circuits' precedent reviewing analogous statutes concurs with the Secretary's own broad inclusion of intracorporate complaints within the protective scope of the statute." *Id.* at 480.

This reasoning clearly supports interpreting Section 510, which is generally analogous to the anti-retaliation section of the CWA, as encompassing internal workplace complaints. In turn, I have no choice but to reject the majority's efforts to minimize and distinguish this prior ruling.[10]

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[10] I do, however, agree with the majority's finding that we do not owe *Chevron* deference to the Secretary's reading of Section 510.

In particular, its assertion that the *Passaic Valley* Court attempted to avoid any "rote application" of its holding overlooks the crucial fact that the Court itself turned to other anti-retaliation provisions in its analysis of the CWA section. For instance, it noted that the anti-retaliation provision in the FLSA is among the statutory provisions that have been expansively construed "to lend broad protective coverage to internal complainants." *Id.* at 479. In any case, I do not believe that following the example set in *Passaic Valley* by carefully taking into account a prior Third Circuit opinion represents any kind of "rote" exercise.

Furthermore, the CWA provision expressly prohibits discrimination against any employee who has "filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter." 33 U.S.C. § 1367(a). At least on the surface, this "filed" and "instituted" language evidently contemplates something more formal than, inter alia, an unsolicited internal complaint to one's superiors. Therefore, I find that Section 510, with its "given information" and "inquiry" language, appears to be even broader than its environmental counterpart, addressed (and broadly construed) in Passaic Valley.

In addition, the Court's ruling in *Brock v. Richardson*, 812 F.2d 121 (3d Cir. 1987), provides yet further support for concluding that Section 510 protects unsolicited internal complaints.

Initially, the majority is correct that *Brock* addressed the question of whether the anti-retaliation provision of the FLSA is triggered by an employer's

ultimately mistaken belief that an employee has engaged in otherwise protected activity under the statute. *Id.* at 122-25. In answering this question in the affirmative, the Court in *Brock* quite appropriately turned to the same kind of broad policy considerations discussed in *Passaic Valley*. *Id.* at 123-25. For instance, it noted that Congress, instead of seeking to secure compliance through detailed and ongoing governmental supervision of employer payrolls, put in place a system relying on information and complaints from the employees itself. *Id.* at 124. "Thus, the [Supreme] Court has made clear that the key to interpreting the anti-retaliation provision is the need to prevent employees' 'fear of economic retaliation' for voicing grievances about substandard conditions.'" *Id.* (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292, 80 S. Ct. 332, 4 L.Ed.2d 323 (1960)). Significantly, the *Brock* Court even indicated a willingness to go beyond the bare language of the statutory provision itself, stating that "courts interpreting the anti-retaliation provision have looked to its animating spirit in applying it to activities that might not have been explicitly covered by the language." *Id.* As an example, it turned to the Tenth Circuit's ruling in *Love v. RE/MAX of America, Inc.*, 738 F.2d 383 (10th Cir. 1984), which applied the anti-retaliation provision "to protect employees who have protested Fair Labor Standards Act violations to their employers."[11] *Brock*, 812 F.2d at 125 (citing *Love*, 738 F.2d at 387).

The majority points out that the anti-retaliation

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[11] It is significant that the *Passaic Valley* Court also relied on *Love* in its analysis of the CWA's anti-retaliation provision. *Passaic Valley*, 992 F.2d at 479.

provision in the FLSA differs from the ERISA counterpart. I agree, but the differences here actually weigh against the interpretation offered by the majority. Just like the anti-retaliation provision in the CWA, the FLSA provides that it is unlawful to discharge or discriminate against an employee because he or she "has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. § 215(a)(3). As previously noted with respect to *Passaic Valley,* this language arguably contemplates some sort of formal filing. *See, e.g., Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000) (finding that FLSA does not protect intra-company complaints because, among other things, the term "proceeding" was "modified by attributes of administrative or court proceedings," the term "instituted" indicates "a formality that does not attend an employee's oral complaint to his supervisor," and "testimony" consists of "statements given under oath or affirmation" (citations omitted)). On the other hand, Section 510 refers to an "inquiry," as opposed to merely a "proceeding," as well as "giv[ing] information," in contrast to mere "testimony." As even the majority recognizes, the Second Circuit accordingly observed that "the plain language of ERISA Section 510" is "unambiguously broader in scope than Section 15(a)(3) of FLSA." *Nicolaou,* 402 F.3d at 328.

In the end, I am unable to agree with the majority's ruling here in light of the statutory language at issue, the expansive purposes and principles underpinning ERISA and its anti-retaliation provision, and (especially)

prior decisions[12] by this very Court broadly interpreting similar anti-retaliation statutes in other federal statutes. I accordingly would reverse the ruling of the District Court and remand for further proceedings.

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[12] In addition to the rulings in *Passaic Valley* and *Brock*, I further note that this Court adopted a somewhat similar approach to the False Claims Act's anti-retaliation provision in *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176 (3d Cir. 2001). The *Hutchins* Court noted, inter alia, that protected activities "can include internal reporting and investigation of an employer's false or fraudulent claims." *Id.* at 187 (citing *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 742 (D.C. Cir. 1998)).

APPENDIX B

UNITED STATES DISTRICT COURT,
E.D. PENNSYLVANIA

Shirley EDWARDS, Plaintiff
v.
A.H. CORNELL AND SON, INC., et al., Defendants.

No. 09-cv-1184. July 23, 2009.

MEMORANDUM AND ORDER

JOYNER, District Judge.

Presently before the Court are Defendants' Motion to Dismiss Plaintiff's Amended Complaint and Plaintiff's Response thereto. For the reasons set forth below, Defendants' Motion to Dismiss is granted.

I. BACKGROUND

Plaintiff Shirley Edwards is a former employee of Defendant A.H. Cornell and Son, Inc.[1] Defendant A.H. Cornell and Son, Inc. ("A.H. Cornell") is a Pennsylvania corporation that performs contracting

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[1] The facts are presented in the light most favorable to the Plaintiffs. *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008).

and construction services. Defendant Melissa J. Closterman ("Closterman") manages or oversees daily operations at A.H. Cornell, including oversight of Plaintiff while she was employed by A.H. Cornell. Plaintiff alleges that Closterman was "directly responsible for terminating Plaintiff." Defendant Scott A. Cornell ("Cornell") is an executive of A.H. Cornell and was responsible for overseeing the terms and conditions of Plaintiff's employment. Plaintiff alleges that Cornell "participated in the termination of Plaintiff's employment."

According to Plaintiff's Amended Complaint,[2] in or around February, 2006, Defendants hired Plaintiff to establish a human resources department at A.H. Cornell. Plaintiff asserts that while she was employed by Defendants, she learned that Closterman was "engaging in unlawful acts." Plaintiff further asserts that Closterman requested that Plaintiff engage in these allegedly unlawful acts.

Specifically, Plaintiff asserts that an employee of A.H. Cornell, who sustained a work-related injury continued to collect worker's compensation insurance for being out of work after the employee had returned to work. Plaintiff claims this employee used a false social security number and information to obtain worker's compensation in the first place. Plaintiff alleges that Closterman directed Plaintiff to make false statements to Defendants' worker's compensation carrier regarding the injured employee. Plaintiff also alleges that in the last several weeks of her employment, Closterman directed Plaintiff to provide false information to a disability insurance carrier.

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[2] Plaintiff filed an Amended Complaint on June 2, 2009.

Plaintiff further asserts that Defendants had a group health insurance plan, governed by ERISA, that "was being administered illegally within Defendant and on a discriminatory basis." Specifically, Plaintiff alleges that Closterman lied to "many employees" about what their contributions would be in order to dissuade employees from opting into the benefits and also did not offer certain employees health benefits at all. Plaintiff avers that Defendants, through Closterman, withheld and concealed required group plan information from employees and "unlawfully enroll[ed] non-citizens in the ERISA-qualifying life, disability and/or group health plan."

Plaintiff alleges that she "objected to participating in a scheme to commit criminal fraud as to Defendants' disabilty insurance carrier, worker's compensation insurance carrier, and health insurance carrier." She further states that she "was directed to commit and/or to participate" in the fraud in close proximity to her termination, which was on February 11, 2009.

Plaintiff's Complaint asserts two Counts: (1) Violations of ERISA-Section 510, 29 U.S.C. § 1140 (Retaliation) and (2) Common-Law Wrongful Discharge. Plaintiff bases her section 510 claim on the allegation that Defendants terminated her for "object[ing] to and/or complain[ing] to Defendants' management or owners" about Defendants' alleged ERISA violations. She asserts that her actions were protected activity under ERISA and thus her termination violated the retaliation provision in ERISA, section 510. Defendants have filed a Motion to Dismiss Plaintiff's Amended Complaint.

II. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 12(b)(6), in response to a pleading, a Defendant may file a motion asserting that the Plaintiff's complaint "[fails] to state a claim upon which relief can be granted." In analyzing a Rule 12(b)(6) motion to dismiss, we "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (citations omitted). "To survive a motion to dismiss, a civil plaintiff must allege facts that 'raise a right to relief above the speculative level. . . .'" *Id.* at 232 (quoting *Bell Atl. Corp. v. Twombley*, 550 U.S. 544, 127 S. Ct. 1955, 1965, 167 L.Ed.2d 929 (2007)). In other words, the plaintiff must provide "enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element[s]" of a particular cause of action. *Id.* at 234. This "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombley*, 127 S. Ct. at 1964-65. In ruling on a Rule 12(b)(6) motion to dismiss, the court may consider documents "integral to or explicitly relied upon in the complaint." *In re Rockefeller Sec. Lit.*, 184 F.3d 280, 287 (3d Cir. 1999).

III. DISCUSSION

A. ERISA-Section 510, 29 U.S.C. § 1140

ERISA, section 510, codified at 29 U.S.C. § 1140, provides in relevant part:

> It shall be unlawful for any person to discharge . . . or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to [ERISA] or the Welfare and Pension Plans Disclosure Act . . . .

29 U.S.C. § 1140 (2006 & Supp. 2008). Section 510 has been referred to as ERISA's "anti-retaliation" provision, or "whistleblower" provision because it prohibits retaliation against a person who has participated in certain protected activity under section 510. *See, e.g.*, *Hashimoto v. Bank of Hawaii*, 999 F.2d 408, 327 (9th Cir. 1993); *King v. Marriott International*, 337 F.3d 421, 427 (4th Cir. 2003). Specifically, section 510 makes it unlawful to retaliate against a person for giving information, testifying, or being about to testify in an "inquiry or proceeding" relating to ERISA or certain other statutory provisions. 29 U.S.C. § 1140.

Defendants' Motion to Dismiss asserts, *inter alia,* that Plaintiff has failed to allege conduct that is protected under the anti-retaliation provisions of ERISA, section 510. The Third Circuit has not yet addressed the scope of ERISA's anti-retaliation provision and, more specicially [sic], whether internal workplace complaints are protected activity under section 510. Only four circuits-the Ninth, the Fifth, the Fourth, and the Second-have considered this issue, all with outcomes resolutions.

The Ninth Circuit was the first to consider the scope of ERISA's anti-retaliation provision in *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993). There, the Court found that the statute was

"clearly meant to protect whistle blowers." *Hashimoto*, 999 F.2d at 411. Thus, the Court reasoned, the language "has given information or has testified in any inquiry or proceeding relating to [ERISA]" could be "fairly construed" to include "[t]he normal first step" of "[present[ing] the problem to the responsible managers of the ERISA plan." *Id.* Because discharging a person for raising the problem in the first place would "discourage[ ] the whistle blower before the whistle is blown," the Ninth Circuit held that making informal, workplace complaints to managers regarding potential ERISA violations is protected activity under section 510. *Id.*

The Fifth Circuit next addressed the issue in *Anderson v. Electronic Data Systems Corporation*, 111 F.3d 1311 (5th Cir. 1994), within the context of determining whether ERISA preempted a plaintiff's state wrongful discharge action. In *Anderson*, after reciting the language of section 510, the Fifth Circuit disregarded the language "inquiry or proceeding" and found broadly that the retaliation provision "prohibits the discharge or other adverse treament of any person because he has given information or testimony relating to ERISA." [sic] 111 F.3d at 1315. Thus, the Court held that "a refusal to commit violations of ERISA and reporting such violations to management" was protected activity that fell within the ambit of the enforcement provisions of ERISA section 510. *Id.* at 1314.

In *King v. Marriott International*, 337 F.3d 421 (4th Cir. 2003), the Fourth Circuit analyzed the scope of the anti-retaliation provision in section 510 and came to a result opposite that of the Ninth and Fifth

Circuits. Reasoning that the anti-retaliation provision in section 510 is narrower than that of Title VII of the Civil Rights Act of 1964, the *King* Court found that the phrase "testified or is about to testify" suggests that the phrase "inquiries or proceedings" is limited to legal or administrative inquiries or proceedings, "or at least to something more formal than written or oral complaints made to a supervisor." 337 F.3d at 427. The Court held, therefore, that filing internal complaints with supervisors, co-workers, or an employer's attorney is not protected activity under section 510 because filing such complaints does not rise to the level of testifying or being about to testify in a proceeding of any kind, nor is it giving information in such a proceeding. *Id.* at 428.

The Second Circuit most recently took up the issue in *Nicolaou v. Horizon Media Incorporated*, 402 F.3d 325 (2d Cir. 2005). In *Nicolauou* [sic], the Court compared the language of section 510 to the retaliation provisions of both the Fair Labor Standards Act ("FLSA") and Title VII.[3] 402 F.3d at 327-29. It found

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[3] Section 704(a) of Title VII, codified at 42 U.S.C. § 2000e-3(a) provides broadly that:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

By contrast, section 15(a)(3) of the FLSA, codified at 29 U.S.C. § 215(a)(3), provides protection against retaliation for a more narrow scope of conduct, stating that it shall be unlawful

> to discharge or in any other manner discriminate against any employee because such employee has filed any

that use of the term "inquiry" in ERISA implies something less formal and unambiguously broader than use of the term "proceeding" in the FLSA. *Id.* at 328. The Second Circuit then looked to the dictionary definitions of the terms "proceeding" and "inquiry." *Id.* at 329. Citing the *Black's Law Dictionary* definition of "inquiry" as "a request for information" and the *Webster's Third New International Dictionary* definition as "the act or an instance of seeking truth, information, or knowledge about something" or "a request for information," the Court found that an "informal gathering of information thus falls within the plain meaning of 'inquiry'" and is, therefore protected activity under section 510. *Id.* (internal citations omitted). The Court concluded that "the proper focus is not on the formality or informality of the circumstances under which an individual gives information, but rather on whether the circumstances can fairly be deemed to constitute an 'inquiry.'" *Id.* at 330. The Court thus held that if the defendant company's attorney contacted the plaintiff to meet with the president of the defendant company in order to provide information regarding alleged ERISA violations at a meeting initiated by the attorney, her actions would be protected under section 510 because that meeting would fall within the definition of an

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complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to testify in any such proceeding . . . .

"inquiry," regardless that it was not formal or external. *Id.*

Looking to the Second and Fourth Circuits, Defendants move to dismiss Plaintiff's Amended Complaint asserting that the conduct for which Plaintiff was allegedly terminated does not constitute "giving information or testifying in an inquiry or proceeding related to ERISA" as required by ERISA, section 510, because her objections or complaints were not part of a formal or informal inquiry or proceeding.[4] In response, Plaintiff argues that informal workplace objections and complaints to management are protected activity under ERISA. Plaintiff draws support from the Second, Ninth and Fifth Circuits.[5]

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[4] Defendants further move to dismiss based on the assertion that Plaintiff failed to allege that Defendants had a specific intent to violate ERISA. Additionally, Defendants argue that even if Plaintiff did properly allege a retaliation claim under section 510, the claim should be dismissed against Closterman and Cornell because they were not Plaintiff's employer but were merely employees of Plaintiff's employer and thus not subject to section 510. Because we find that Plaintiff's alleged conduct does not constitute the giving of information, testifying, or being about to testify in an inquiry or proceeding, we need not reach Defendants' alternative grounds for dismissal.

[5] Plaintiff also cites to *Jorgensen v. Prudential Ins. Co. of America*, 852 F. Supp. 255 (D.N.J. 1994). In *Jorgensen*, within the context of determining whether ERISA preempted a Plaintiff's state law claims, the Court found that the plaintiff "ha[d] not given information or testified in an inquiry or proceeding relating to ERISA, as required by ERISA § 510." 852 F. Supp. at 262-63. Rather than finding that the plaintiff's alleged complaints to his supervisors were, therefore, not protected under section 510, the Court stated that the Ninth Circuit in *Hashimoto* had "extended ERISA whistleblower protections to include the 'first step' of raising the problem to the employee's superiors." *Jorgensen*, 852 F. Supp. at 263.

Upon consideration of the statutory language in the relevant provision, this Court finds the Second Circuit's analysis in *Nicolaou* to be persuasive. Thus, we agree that the proper inquiry is whether the Plaintiff's alleged objections and complaints to management in the present case were given as part of an inquiry.[6] *See Nicolaou*, 402 F.3d at 330. After reviewing the allegations in the Amended Complaint, we find that they were not. Plaintiff alleges that she "objected to and/or complained to Defendants' management or owners" about Defendants' alleged ERISA violations. Plaintiff does not allege that anyone requested information from her or initiated contact with her in any way regarding the alleged ERISA violations. *Compare with Nicolaou*, 402 F.3d at 330 (finding conduct protected under section 510 where a meeting to discuss alleged ERISA violations was initiated by the defendant's attorney as part of the attorney's inquiry into the alleged ERISA violations). Nor does she allege that she was involved in any type of formal or informal gathering of information. *See Nicolaou*, 402 F.3d at 330 (finding that the information gathering of information falls within the meaning of "inquiry" and is thus covered under section 510). She states merely that she objected to or complained about certain conduct by Defendants. Thus, viewing the facts in the light most favorable to the non-moving party, Plaintiff has failed to properly

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[6] The Plaintiff has not in any way alleged that she was part of a proceeding or that she gave testimony or was about to give testimony at an inquiry or proceeding. Thus, the only relevant inquiry is whether she gave information as part of an inquiry.

allege any conduct that would fall within the ambit of the retaliation provision in section 510. Defendants' Motion is, therefore, granted.

B. Common-Law Wrongful Discharge

Having dismissed Plaintiff's only federal claim, the Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state law claim. *See* 28 U.S.C. § 1367.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss is GRANTED as to Plaintiff's ERISA, section 510 claim. As we decline to exercise supplemental jurisdiction, Plaintiff's common-law wrongful discharge claim is DISMISSED with leave to Plaintiff to re-file it in state court. An appropriate order follows.

ORDER

AND NOW, this 23rd day of July, 2009, it is hereby ORDERED Defendants' Motion to Dismiss is GRANTED as to Plaintiff's ERISA, section 510 claim. Furthermore, the Court declines to exercise supplemental jurisdiction. Plaintiff's common-law wrongful discharge claim is, therefore, DISMISSED with leave to Plaintiff to re-file it in the appropriate state court.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-3198

SHIRLEY EDWARDS, Appellant

v.

A.H. CORNELL AND SON, INC., D/B/A AH CORNELLS; MELISSA CLOSTERMAN; SCOTT A. CORNELL

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-09-cv-01184)
District Judge: Honorable J. Curtis Joyner

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

Present: McKEE, *Chief Judge*; SLOVITER, SCIRICA, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, VANASKIE and COWEN*, *Circuit Judges*.

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* Judge Cowen's vote is limited to panel rehearing only.

The petition for rehearing filed by Appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is hereby DENIED.

BY THE COURT:
/s/ D. Michael Fisher
Circuit Judge

Dated: July 26, 2010
DWB/cc:

Justin L. Swidler, Esq.
Christie M. Flamm, Esq.
Walter H. Flamm, Jr., Esq.
Eric C. Lund, Esq.
Nathaniel I. Spiller, Esq.